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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 DANELLE PRUETT,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE , Commissioner of
15 Social Security Administration,

16 Defendant.

17 CASE NO. C07-5188JKA

18 ORDER REMANDING
19 ADMINISTRATIVE DECISION

20 This matter has been referred and reassigned to the undersigned Magistrate Judge pursuant to 28
21 U.S.C. § 636(c). Plaintiff brings the instant action pursuant to 205(g) of the Social Security Act ("the
22 Act"), as amended, 42 U.S.C. § 405(g), to obtain judicial review of the administration's final decision
23 denying plaintiff's application for disability insurance benefits. After reviewing the record, the court finds
24 and orders as follows:

25 1. It is very important to point out that judicial review of a social security case is based upon the
26 pleadings and the transcript of the record. 42 U.S.C. § 405(g). Jurisdiction of this court on review is not to
27 reweigh the evidence before the ALJ or to substitute its own judgment for that of defendant. Hall v.
28 Secretary of Health, Education, and Welfare, 602 F.2d 1372, 1374 (9th Cir.1979). The scope of review is
limited to determining whether the Commissioner applied the correct legal standards and whether the
record, as a whole, contains substantial evidence to support the Commissioner's findings of fact. 42
U.S.C. § 405(g); Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence is such

1 relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v.
 2 Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than a
 3 scintilla but less than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir.
 4 1975); Carr v. Sullivan, 772 F. Supp. 522, 525 (E.D. Wash. 1991). If the evidence admits of more than
 5 one rational interpretation, the Court must uphold the Secretary's decision. Allen v. Heckler, 749 F.2d
 6 577, 579 (9th Cir. 1984).

7 After carefully reviewing the record, the undersigned finds the ALJ's decision is not properly
 8 supported by substantial evidence nor free of significant legal error. The matter must be remanded for
 9 further consideration.

10 2. Plaintiff argues the following issues in her Opening Brief: (i) her mental impairments meet the
 11 severity criteria of Listing 12.05(C); (ii) the ALJ improperly concluded Plaintiff's PTSD, ADHD, Bipolar
 12 Disorder and Psychotic Disorder are non-severe; (iii) the ALJ failed to provide convincing or legitimate
 13 reasons for rejecting the medical opinions of Dr. Price, Dr. Bremer, Dr. Satter, Dr. Ang, Nurse Nelson,
 14 Dr. Harrison, Dr. Lysak, and Dr. Lewy; (iv) Dr. Lewy is not an impartial medical expert; (v) the ALJ
 15 failed to properly consider the lay testimony; and (vi) the testimony of the vocational expert is based on
 16 an incomplete hypothetical question.

17 Defendant does not directly respond to all of these arguments. Instead, Defendant focuses the
 18 court's attention on the issue of Plaintiff's credibility, which the ALJ discusses at length in his opinion
 19 and which is the basis for the ALJ's rejection of medical evidence that suggests Plaintiff is not able to
 20 continue working. Plaintiff does not dispute the ALJ's finding that Plaintiff's credibility is questionable,
 21 but asserts that this is just one of the symptoms of Plaintiff's mental health and is not a legitimate basis to
 22 deny her application for social security benefits.

23 3. The issue of credibility of Plaintiff in this case is very significant. The court notes it is the
 24 ALJ who is responsible for determining credibility, Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir.
 25 1999). Albeit, the ALJ's credibility findings must be properly supported by the record, and "must be
 26 sufficiently specific to allow a reviewing court to conclude the adjudicator rejected the claimant's
 27 testimony on permissible grounds and did not 'arbitrarily discredit a claimant's testimony regarding
 28 pain.'" Bunnell v. Sullivan, 947 F.2d 341, 345-46 (9th Cir. 1991) (*en banc*) (*quoting Elam v. Railroad*

1 Retirement Bd., 921 F.2d 1210, 1215 (11th Cir. 1991)).

2 Relying on substantial medical evidence, the ALJ discredited Plaintiff's allegations of total
 3 disability. He relied on Dr. Wingate, a psychologist, who examined Plaintiff on June 16, 2004 (Tr.
 4 227-36). On the test of memory malingering, Plaintiff scored in the less than chance range, at 9/50 on the
 5 second trial (Tr. 236). Dr. Wingate noted that even very brain damaged persons score around 48/50 (Tr.
 6 236). Dr. Wingate concluded that Plaintiff obviously knew the correct answer, but intentionally chose the
 7 incorrect answer (Tr. 230, 236). The ALJ also relied on Dr. Harrison and Dr. Lewy to support his finding
 8 that Plaintiff was not truthful, specifically during medical examinations.

9 Dr. Harrison, another psychologist, examined Plaintiff on October 25, 2004. She found Plaintiff
 10 demonstrated questionable motivation and effort (Tr. 311). Dr. Harrison expressed concern that Plaintiff
 11 might have relapsed into alcohol abuse, but determined that Plaintiff intentionally over-represented
 12 problems and symptoms (Tr. 311). Dr. Lewy, the medical expert called to testify in this matter at the
 13 administrative hearing, referred to Dr. Wingate's memory malingering findings, noting that a pure chance
 14 score on this "either-or" test would be 25/50 (Tr. 542). The only way to interpret Plaintiff's score of 9/50
 15 was that she was purposely trying to give the wrong answers (Tr. 542). Dr. Lewy felt that the low
 16 intellectual scores of record were not accurate, but affected by Plaintiff's conscious effort to give
 17 incorrect answers (Tr. 542-43, 556, 559).

18 In addition to the medical opinions regarding Plaintiff's credibility, the ALJ also relied on the
 19 inconsistency in Plaintiff's statements made to her physicians. For instance, the ALJ noted completely
 20 different descriptions of her substance abuse history when she was examined by Dr. Price in September
 21 2003 (to whom she reported very little problem with drug use) and when she was examined by Dr. Sattar
 22 in November of the same year (she reported a long history of drug abuse) (Tr. 23).

23 In sum, the ALJ properly assessed Plaintiff's credibility. But, as explained below it does not
 24 provide a sufficient basis in this case for the ALJ to reject all of the physician's opinions that support a
 25 more severe impairment than assigned by the ALJ.

26 4. The ALJ's evaluation of the medical evidence and his assessment of Plaintiff's residual
 27 functional capacity are not properly supported by substantial medical evidence. The ALJ determined that
 28 Plaintiff retained the following residual functional capacity (RFC): Lift and carry 50 pounds occasionally,

1 25 pounds frequently; sit, stand and/or walk 6 hours per day; occasionally climb ramps and stairs; never
 2 climb ladders, ropes, or scaffolds; must avoid hazards (machinery, heights, etc.); only limited contact with
 3 the public; able to perform detailed, but not complex work (Tr. 25, 27 Finding 6).

4 The ALJ did not rely on any medical opinions that reflect these limitations. The ALJ explained
 5 that his assessment was different than that medical opinions of record. For instance the ALJ explained
 6 that the DDS consultants and Dr. Price found Plaintiff capable of working, but restricted her to simple,
 7 repetitive tasks. The ALJ did not restrict her to simple, repetitive tasks. The ALJ explained that these
 8 physicians supported this greater limitation based on their reliance on Plaintiff's subjective statements to
 9 support this more restrictive limitation. But, the undersigned does not agree.

10 Although an ALJ may reject medical opinions, or portions of an opinion, that are based on
 11 unreliable subjective reports from a patient (Tonapetyan v. Halter, 242 F.3d 1144, 1147-48 (9th Cir.
 12 2001); Morgan v. Commissioner of SSA, 169 F.3d 595, 599-600 (9th Cir. 1999), Fair v. Bowen, 885 F.2d
 13 597, 605 (9th Cir.1989)), here, the ALJ discredited all of the medical evidence of record. Not one
 14 physician who examined, treated or even consulted on the case assigned limitations similar to the ALJ.

15 Somewhat confusing to the court is the ALJ's inclusion of malingering as a severe impairment,
 16 but he does not assign or explain any limitations related to malingering. The ALJ relies on malingering,
 17 not as a disease or diagnosis, but only to discredit Plaintiff's claim of disability. In contrast, several
 18 physicians discussed plaintiff's malingering, and they discussed or assigned limitations in light of this
 19 diagnosis or problem. As noted above, all physicians who assigned limitations found greater limitations
 20 than the ALJ. For example, both Dr. Bremer and Dr. Harrison were aware of Plaintiff's credibility issue,
 21 but they both incorporated this knowledge into their assessments and limitations. Dr. Bremer assessed
 22 her functioning to be fair to poor in virtually all areas. Dr. Harrison assessed several "moderate"
 23 limitations of mental functioning. Significantly, the ALJ did not have any physician or record who made
 24 similar limitation findings to his own. The ALJ's findings are not supported by the medical evidence, and
 25 the matter needs to be remanded to allow the administration the opportunity to reevaluate the medical
 26 evidence

27 5. Dr. Lewy was called to testify at the administrative hearing as a medical expert, presumably an
 28 independent medical expert. Plaintiff objected and raised the issue of Dr. Lewy's independence at several

1 opportunities, including at the hearing. Plaintiff takes issue with the fact that Dr. Lewy is a physician
2 who works under contract for the administration, and thus, has a conflict of interest in testifying as a
3 medical expert in this case. The ALJ rejected Plaintiff's argument, explaining that Dr. Lewy's contracted
4 services were limited to "quality assurance" (i.e., administrative sufficiency) reviews, and he was not
5 involved in making any decisions in the cases. The ALJ stated Plaintiff's argument appeared to be
6 "gamesmanship", rather than a serious concern.

7 Under 20 C.F.R. 4040.1527(f)(2)(iii) "[a]ll implications of possible conflict of interest between
8 medical or psychological consultants and their medical or psychological practices will be avoided.
9 [omitted]. Physicians and psychologists who do review work for us will not perform consultative
10 examinations for us without our prior approval."

11 Dr. Lewy works 30 hours per week under contract for the administration to review cases for
12 quality assurance. His role in this case was limited to being a medical expert, and there does not appear
13 to be a direct conflict of interest (i.e., he has not been involved in the case in any prior proceeding,
14 examination or consultation). The regulation does not expressly prohibit his participation. However, the
15 court notes that Dr. Lewy would probably be prohibited from doing any "quality assurance" work on this
16 matter for the administration. Despite finding no direct conflict of interest, because this matter is being
17 remanded for further review, the administration should call a different medical expert to offer testimony
18 in this matter to avoid any appearance of a conflict of interest.

19 6. Accordingly, the Court remands the matter to the Social Security Administration for further
20 consideration of the medical evidence. On remand the matter should be assigned to another ALJ and a
21 different medical expert should also be utilized.

22 DATED this 20th day of November 2007.

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24 /s/ J. Kelley Arnold
25 J. Kelley Arnold
26 U.S. Magistrate Judge
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